IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4206 OF 2005

Dr. Ranjit Ramchandra Upadhyaya) ..Petitioner.
Age:55, Occ. Medical Practitioner)
R/at Satyam Hospital, Salas Co-op.)
Hsg.Soc.Ltd.,Ram Baug Lane No.4,)
Kalyan (W),Dist. Thane.)

Versus

1.M/s.Salas Co-op.Hsg.Society Ltd.) ..Respondents.
through its Chairman/Secretary)
Mr. M.N.Sonawane

2.The Deputy Registrar of Co-op.)
Societies, Sai Veehar Bldg.,)
Above Gurudev Hotel, Shivaji)
Path, Kalyan (W), Dist.Thane)

Mr. R.S. Apte with A.A.Garge for the Petitioner.
Mr. Rajesh Datar for Respondents.

CORAM : S. A. BOBDE, J.

DATED : 14TH JULY, 2005.

ORAL ORDER :-

1. Rule, returnable forthwith.

2. Mr. Datar waives service of rule for the Respondents.

3. Heard by consent.

4. The petitioner is a member of the Respondent -

Co-operative Housing Society. The dispute between the parties is whether the petitioner is liable to pay maintenance charges in respect of twelve units or three units. According to the petitioner, he is liable to pay maintenance charges of two units. According to the society he is liable to pay for three units. The case of the society is based on consent terms, said to have been arrived at between the petitioner and the society on 18th March, 1994, in which the petitioner said to have agreed that he is owner of three units.

5. The present proceeding arose out of the proceedings initiated by the petitioner for restraining the society from recovering maintenance charges in respect of three units. This proceeding was initiated before the Dy. Registrar. The Dy. Registrar observed in his order dated 29.12.2004 that the petitioner should be charged according to the conveyance deed for two units. Against that, the Society filed Appeal before the Divisional Joint Registrar. Before the Divisional Joint Registrar, the petitioner pleaded that the consent terms, on which the society relies, were obtained by fraud and that the original conveyance deed and share certificates were not shown to the petitioner.

6. According to the petitioner, the original conveyance deed and share certificates issued subsequent to the consent terms show that the petitioner is the owner of only two units and not three units. This submission seems to have fallen on deaf ears. The Revisional Joint Registrar has merely, on the basis of the consent terms, observed that the petitioner has agreed to pay maintenance charges for three units and, therefore,he has allowed the respondent's application, without even going into the question of fraud alleged by the petitioner. I am of view that the order is not sustainable since it does not deal with the main issue at all and makes the petitioner liable for three units only on the basis of the consent terms.

7. Mr. Datar, the learned counsel for the respondents, submitted that the Registrar, in exercise of his powers under section 79, cannot go into the question whether the consent terms before the corporation were obtained by fraud played on the petitioner. According to the learned counsel, therefore, the petitioner has filed separate proceedings under section 91 for having the consent terms set aside. Mr. Apte, the learned counsel for

the petitioner strongly opposes this contention on the basis of the judgment of the Supreme Court in the case of Gram Panchayat of Village Naulakha vs. Ujagar Singh & Ors. reported in AIR 2000 Supreme Court 3272, in which it was argued that statutory authorities under the Punjab Village Common Land (Regulations) Act, 1961 could not ignore an earlier decree against the Panchayat on the ground of its being collusive and fraudulent, unless the Panchayat had first filed an independent suit to set aside the said decree or sought declaration that the decree was collusive or fraudulent. The Supreme Court rejected that contention in the following words :-

> "Thus, in order to contend in a latter suit or proceeding that an earlier judgment was obtained by collusion, it is not necessary to file an independent suit as stated in Jagar Ram's case (AIR 1991 Punj and Har 159) for a declaration as to its collusive nature or for setting it aside, as a condition precedent. In our opinion, the above cases cited in Sarkar's Commentary are correctly decided. We do not agree with the decision of the Full Bench of the Punjab and Haryana High Court in Jagar Ram's case. The Full Bench has not

referred to Section 44 of the Evidence Act nor to any other precedents of other Courts or to any basic legal principle.

7. The law in England also appears to be the same, that no independent suit is necessary. In Spencer-Bower and Turner on Res Judicata (2nd Ed., 1969) it is stated (para 359) that there are exceptions to the principle of res judicata. If the party setting up res judicata as an estoppel has alleged all the elements of an estoppel (i.e. ingredients of res judicata), it is still open to the latter (the opposite party to defeat the estoppel by setting up and establishing certain affirmative answers. Of these there are four main classes - fraud, cross- estoppel, contract and public policy. The author clearly says that no active proceedings for 'rescission' of the earlier judgment are necessary. They state (para 370) as follows :

"The avoidance of a judicial act on the ground of fraud or collusion is effected not only by active proceedings for rescission ..... but also by setting up the fraud as a defence to

> an action on the decision, or as an answer to any case which, whether by way of estoppel or otherwise, depends for its success on the decision being treated as incontrovertible."
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> Thus, the law is well settled that no independent suit as a condition precedent is necessary."

8. In this view of the matter and having regard to the fact that the Registrar exercises a quasi-judicial power like the power of the Collector in the case cited supra, I am of view that the impugned order is liable to be set aside and it is hereby set aside. The matter is hereby remanded back to the Deputy Registrar for fresh decision in accordance with law. In the meanwhile, the petitioner shall continue to pay maintenance as per the consent terms which are not yet set aside. In case, the decision is in petitioner’s favour, he would be entitled to seek adjustment of the amount so paid by him. All contentions on merits are kept open.

9. Rule is made absolute in the above terms.

14.07.2005 (S.A.BOBDE,J.)

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